

IN THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

DANIEL THOMAS DE CARLO,  
LAWRENCE DE CARLO,  
  
Appellants,  
  
vs.  
  
UNITED STATES OF AMERICA,  
  
Appellee.

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FEB 2 1969

NO. 22558

**FILED**

APPELLEE'S BRIEF

FEB 10 1969

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APPEAL FROM  
THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

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NO. 22568

APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the then Southern Division of the Southern District of California, adjudging appellants to be guilty as charged in all three counts of the indictment, following trial by jury. [C.T. 14]<sup>1</sup>

The offenses occurred in the then Southern Division of the Southern District of California. The District Court had jurisdiction by virtue of Title 18, United States Code, Section 3231, and Title 21, United States Code, Section 176(a).

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<sup>1</sup> "C.T." refers to Clerk's Transcript.



Jurisdiction of this Court rests pursuant to Title 28, United States Code, Sections 1291 and 1294.

## II

### STATEMENT OF THE CASE

Appellants and Miriam De Carlo were charged, together with Michael George Brown and Sharilyn George Brown, in all three counts of the indictment returned by the Federal Grand Jury for the Southern Division of the Southern District of California.

The first count alleged that on July 31, 1966, the Browns knowingly smuggled 19 pounds of marihuana into the United States from Mexico, contrary to Title 21, United States Code, Section 176(a), aided and abetted by appellants and Miriam De Carlo. [C.T. 2]

The second count alleged that on July 31, 1966, the Browns knowingly concealed and facilitated the transportation and concealment of approximately 19 pounds of marihuana, which, as they then and there well knew had been imported and brought into the United States contrary to law, aided and abetted by appellants and Miriam De Carlo. [C.T. 3]

The third count alleged that appellants and the Browns conspired to smuggle marihuana into the United States from Mexico and to conceal and facilitate the concealment and transportation in violation of Title 21, United States Code, Section 176(a), and to effect the object of the conspiracy



two overt acts were committed:

1. On July 31, 1966, all four went to Tijuana.
2. On July 31, 1966, Michael George Brown brought the marihuana into the United States from Mexico. [C.T. 4]

Jury trial of appellants commenced on March 28, 1967, before United States District Judge William P. Copple. Appellants were found guilty on all three counts as charged on March 29, 1967. [C.T. 33, 34]

A motion for a new trial was filed on June 26, 1967. [C.T. 40, 41] This motion was denied on June 30, 1967, after a hearing. [C.T. 49, 50]

Thereafter, on June 30, 1967, appellant Daniel Thomas De Carlo was committed to the custody of the Attorney General for five years upon each of counts one, two and three, to run concurrently with each other. On the same date, appellant Lawrence De Carlo was committed, pursuant to Title 18, United States Code, Section 5010(b), to the custody of the Attorney General for treatment and supervision until discharged pursuant to the provisions of the Federal Youth Corrections Act on each of the three counts to run concurrently with each other. [C.T. 54]

Notice of appeal was filed as to both appellants on June 30, 1967. [C.T. 50, 51]



### III

#### ERRORS SPECIFIED

Appellants' errors specified on appeal are paraphrased as follows:

1. Admissions of appellants to "prior similar acts" were inadmissible.
2. Appellants' possession and smoking of marihuana on the trip to Mexico was inadmissible.
3. Appellants were compelled to testify in violation of the Fifth Amendment.
4. The court failed to properly instruct the jury as to the accomplice's testimony.
5. At the hearing on appellants' motion for a new trial, appellants were denied the right of confrontation of witnesses in violation of the Sixth Amendment.
6. The Court should have required corroboration of the Browns' testimony.



#### IV

#### STATEMENT OF THE FACTS

At 3:30 a.m. on July 31, 1966, Michael Brown drove his automobile into the United States at San Ysidro, California, from Tijuana, Mexico, with his wife, Sharilyn Brown as a passenger. [R.T. 41-43]<sup>2</sup> Eleven kilo-packages of marihuana were found under the hood of the vehicle. [R.T. 47-49]

Michael Brown testified that he picked up appellants and Miriam De Carlo at their home in Inglewood at about 11:30 a.m. on July 30, 1966. [R.T. 61] He then picked up his wife, Sharilyn, and all five went to Mexico. [R.T. 62] Danny looked for an American in Tijuana about obtaining some marihuana. He had dealt with the American before. [R.T. 65-66] While all five were present, he advised that the American did not have the amount of marihuana he wanted and he would try talking with a Mexican he had dealt with before. Because of success in prior dealings with the Mexican he felt he would not be caught. [R.T. 67-68]

Danny, Larry, and Mr. Brown negotiated with the Mexican. Around midnight they finally agreed with the Mexican to purchase the marihuana from the Mexican while all five were in the Mexican's taxicab. [R.T. 68-70]

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<sup>2</sup> "R.T." refers to Reporter's Transcript.



Danny and Mr. Brown followed the taxi driver to his home. After two to three hours the marihuana was received by them and placed under the hood. [R.T. 71] Danny paid the Mexican \$400. [R.T. 72, 76] They then returned to the downtown area and left for the border where the DeCarlos alighted and walked through the border. [R.T. 74] This had been pre-arranged. [R.T. 74] They were to meet at Oscar's but the Browns were arrested. [R.T. 74, 75]

Larry De Carlo bought the gasoline for the trip and gave Mr. Brown spending money. He was to use any money he got from the venture to take a trip to Canada. [R.T. 76-77]

The De Carlos admitted to smuggling marihuana on previous occasions, the first time being about two months before. [R.T. 78, 86]

Mrs. Brown generally corroborated her husband's testimony and further testified they smoked marihuana provided by the De Carlos on the trip down. [R.T. 189]

The De Carlos testified the trip was a pleasure trip and that they became separated from the Browns in Tijuana and were thus returning by themselves on foot. [R.T. 108-134, R.T. 135-150, R.T. 159-164]



ARGUMENT

1. APPELLANTS' ADMISSIONS AS TO "PRIOR SIMILAR ACTS" WERE ADMISSIBLE.

Evidence of "prior similar acts" is admissible.

Theobald v. United States, 371 F.2d 769

(9th Cir. 1967);

Medrano v. United States, 285 F.2d 23, 26

(9th Cir. 1960);

Moose v. United States, 150 U.S. 57, 61 (1893).

Appellant admits he made no objection. [A.B. 33,  
line 10]<sup>3</sup> This constitutes a waiver unless there is plain  
error.

Ramirez v. United States, 294 F.2d 277,

283 (9th Cir. 1961);

Stein v. United States, 166 F.2d 851,

855 (9th Cir. 1948).

There is no error in this case.

The jury was instructed that appellants' statements made outside of court should be weighed with caution and great care [R.T. 238], and that they were not on trial for any act or conduct not alleged in the indictment. [R.T. 254]

The instructions were not objected to by counsel for appellants, and none were offered. This constitutes a

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<sup>3</sup> "A.B." refers to Appellants' Brief



waiver. Rule 30, Federal Rules of Criminal Procedure, and Rule 18(2)(d) of the United States Court of Appeals for the Ninth Circuit. Also see reasoning in Teasley v. United States, 292 F.2d 460, 467 (9th Cir. 1961). This evidence was further admissible for impeachment of appellants who claimed they had made no recent trips to Mexico [R.T. 110, 126, 142, 165], and further claimed no marihuana was in the car or smoked. [R.T. 110, 126, 142, 165]

See Anthony v. United States, 256 F.2d 56 (9th Cir. 1958), wherein the facts were very similar.

This evidence also tended to show an existing continuing conspiracy which the Browns joined. In Sanchez v. United States, 293 F.2d 260 (8th Cir. 1961) relied on by appellants, there were objections to the questions. Here there were none. In that case, the objectionable questions called for hearsay statements of a third party. The statements complained of here were statements of appellants as to prior identical acts, testified to in open court.

The error, if any, was cured by instructions of the court. [R.T. 254]

The jury in Sanchez was not given a "curing instruction" (supra, at 266).



2. APPELLANTS' POSSESSION AND SMOKING OF MARIHUANA ON THE TRIP TO MEXICO WERE ADMISSIBLE.

Mrs. Sharilyn Brown testified that marihuana cigarettes were passed to her and her husband from the back seat where the three De Carlos were seated.

Evidence of recent use of marihuana has been held admissible by this court.

Klepper v. United States, 331 F.2d 694  
(9th Cir. 1964).

Evidence of a partially-smoked marihuana cigarette found in the defendants' apartment away from the scene of the crime and unconnected with the charge on trial, has been held admissible.

Teasley v. United States, supra at 466.

The smoking of the marihuana took place during the conspiracy.

. . . . "wide latitude" is allowed in presenting evidence and it is within the discretion of the trial court to allow evidence which even remotely tends to establish the conspiracy charged.

Schino v. United States, 209 F.2d 67,  
74 (9th Cir. 1953).

Counsel were not surprised as claimed. The issue was raised in questions to Miriam De Carlo on cross-examination. [R.T. 167] No objection was then made nor when the question was asked of Mrs. Brown.



Enriques v. United States, 314 F.2d 703 (9th Cir. 1963) relied on by counsel as authority for points one and two is not in point. Different drugs were involved; use of marihuana in a heroin sale case.

The other cases cited on this point on Page 40 of appellants' brief lend little comfort to their position. To the contrary, they appear to support the government's theory.

In addition, smoking marihuana while riding in an automobile, certainly infers prior similar acts since it was no doubt being concealed and transported, thus an act identical to count two.

With admissions of prior recent smuggling, an inference can be drawn, they smuggled the marihuana they were smoking. However, possession would substitute for knowledge of illegal importation of the smoked marihuana.

### 3. APPELLANTS WERE NOT COMPELLED TO TESTIFY.

As argued in Point No. One, the testimony by Mr. Brown, as to similar acts, is admissible. Admissible evidence that might induce an otherwise hesitant defendant to testify can hardly be a violation of his rights not to testify. Besides, he can still refuse to testify.

Since Mr. Brown had clearly implicated appellants in the alleged smuggling, it is difficult to see how



admissions of prior appellants' smuggling ventures would cause appellants to testify.

Appellant again complains about instructions or lack of instructions, while admitting none were requested or objected to. [A.B. 49] Bruton v. United States, 88 S. Ct. 1620 (1968), relied on by appellants, is not in point. In Bruton extrajudicial admission of a co-defendant implicating Bruton were admitted. Here there was testimony of the Browns in open court as to statements and acts of appellants.

4. ACCOMPLICE INSTRUCTIONS WERE NOT REQUIRED.

The courts instructions were complete and "boiler plate" in nature.

Failure to give an accomplice instruction is not error. This is especially true when an instruction was not requested.

Rule 30, Federal Rules of Criminal Procedure.

Lopez v. United States, 373 U.S. 427 (1963);

O'Neal v. United States, 310 F.2d 175

(9th Cir. 1962);

United States v. George, 319 F.2d 77

(6th Cir. 1963).

The court instructed the jury to consider the circumstances under which the witness testifies. [R.T. 237]

It is probable that many criminal trial lawyers prefer no accomplice instruction when their clients testify



and deny guilt.

The court cautioned the jury that extra-judicial admissions "should be considered with caution and great care."

[R.T. 237]

The prior similar acts were limited. The Court instructed: "The defendants are not on trial for any act of misconduct not alleged in the indictment." [R.T. 254]

Again with no objection, and no proffered instructions results in a waiver.

Singer v. United States, 380 U.S. 24,

38 (1965);

Anthony v. United States, supra at 59,

and see O'Neal, supra.

Alleged error should be challenged during the proceedings and not for the first time on appeal.

5. APPELLANTS WERE NOT DENIED THE RIGHT OF CONFRONTATION.

Appellants contend the failure of the Browns to testify at the hearing on the motion for a new trial was a violation of the Sixth Amendment to the Constitution of the United States, their right to be confronted with the witnesses against them. The burden was on appellants. It was their motion. They made no attempt to produce the Browns. The government did, but was unsuccessful.



Appellants' motion for a new trial is apparently based on newly discovered evidence.

The evidence presented at the hearing was an attempt to impeach the government's witness, Mr. Brown. The witnesses testified, in effect, that Brown was testifying for the government to keep his wife from being deported to Canada.

There was no showing that the testimony of these witnesses was newly discovered. To the contrary, the witnesses were friends of the De Carlos' and were even fellow members of a motorcycle club. These witnesses were impeached at the hearing by a felony conviction and inability to identify Mr. Brown from a photograph.

The evidence, even if assumed to be newly discovered, would merely be cumulative, as the court found. Defense witness, Douglas Ulrich, testified to the same effect. [R.T. 152-153]

There was ample direct evidence in the form of the testimony of two eye-witnesses, Mr. and Mrs. Brown.

As to criminal cases, evidence upon appeal is viewed most favorable to the government.

Glasser v. United States, 315 U.S. 60 (1942);  
Yeorgain v. United States, 314 F.2d 881,  
882 (9th Cir. 1963).

This rule also includes all reasonable inferences to be drawn from the evidence.



Yeorgain, supra, at 882.

In the Federal courts, testimony of accomplices, without corroboration, is sufficient to convict.

Bible v. United States, 314 F.2d 106,

108 (Cert. Den. 375 U.S. 862);

Cheadle v. United States, 370 F.2d 314

(9th Cir. 1966).

This is true even though the accomplice is in a position to gain favors and even though there are inconsistencies in the testimony.

Lyda v. United States, 321 F.2d 788,

794 (9th Cir. 1963).

However, there is corroboration in this case, in the form of photographs of the defendants and their own admissions of being present in Tijuana.

In local jurisdictions that require corroborations, this corroboration need only be slight and need not be incriminating in nature.

It is interesting to note that neither Daniel nor Lawrence De Carlo, in their testimony, specifically denied knowing the marihuana was in the vehicle.

The evidence was, therefore, sufficient to be submitted to the jury and the motions for judgment of acquittal were properly denied.



VI

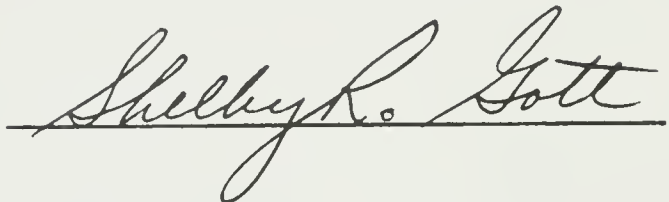
CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment of the court below should be affirmed.

Respectfully submitted,

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United States Attorney

SHELBY R. GOTT  
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A handwritten signature in cursive script, reading "Shelby R. Gott", is written over a horizontal line.

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